

FEDERAL MAGISTRATES COURT OF AUSTRALIA

KAYIKCI v MINISTER FOR IMMIGRATION & ANOR [2008] FMCA 1212

MIGRATION – Partner visa – whether still in spousal relationship with previous partner – applicant married at time of application – being a spouse requires a mutual commitment to a shared life ...to the exclusion of all others – applicant and sponsor not have a mutual commitment to a shared life as husband and wife – relationship contrived for migration purposes – applicant not spouse of sponsor.

Migration Act 1958 (Cth), ss.359A, 474

Migration Regulations 1994, reg.1.15A, cl.820.211

Federal Magistrates Court Rules 2001, r.44.11, 44.12

Lee v Minister for Immigration and Multicultural and Indigenous Affairs
[2005] FCA 464

Granada Tavern v Smith [2008] FCA 646

Whisprun Pty Ltd v Dixon (2003) 200 ALR 447

Minister for Immigration v Yusuf (2001) 206 CLR 323

Applicants M160/2003 v Minister for Immigration and Multicultural and Indigenous Affairs & Ors [2005] FCA 195

NAHI v Minister for Immigration and Multicultural and Indigenous Affairs
[2004] FCAFC 10

Chen Xin He v Minister for Immigration and Ethnic Affairs (Federal Court of Australia, RD Nicholson J, 23 November 1995, unreported)

Tefonu Pty Limited v Insurance and Superannuation Commissioner (1993) 44 FCR 361

Minister for Immigration and Citizenship v Applicant A125 of 2003 [2007] FCAFC 162

SZINP v Minister for Immigration and Citizenship [2007] FCA 1747

SHUB v Minister for Immigration and Multiucultural and Indigenous Affairs
(2003) 137 FCR 43

Nassouh v Minister for Immigration and Multicultural Affairs [2000] FCA 788

Associated Provincial Picture Houses Ltd v Wednesbury Corp (1948) 1KB 223

MIC v Le & Others (2007) 242 ALR 455

Re MIMIA, ex parte Applicant S20/2002 (2003) 77 ALJR 1165

Young v MIC & Anor [2008] FMCA 516

Applicant:	SEMSITTIN KAYIKCI
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	MIGRATION REVIEW TRIBUNAL
File number:	MLG 32 of 2008
Judgment of:	Turner FM
Hearing date:	23 June 2008
Date of last submission:	23 June 2008
Delivered at:	Melbourne
Delivered on:	3 October 2008

REPRESENTATION

Counsel for the Applicant:	Mr Krohn
Solicitors for the Applicant:	Erskine Rodan & Associates
Counsel for the First Respondent:	Ms Burchell
Solicitors for the First Respondent:	Clayton Utz

ORDERS

- (1) The application filed 11 January 2008 is dismissed.
- (2) The applicant pay the first respondent's costs fixed in the sum of \$5,000.00 within 14 days.
 - (i)

**FEDERAL MAGISTRATES
COURT OF AUSTRALIA AT
MELBOURNE**

MLG 32 of 2008

SEMSITTIN KAYIKCI
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

MIGRATION REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

1. This is an application for an order to show cause why a remedy should not be granted in respect of a decision of the Migration Review Tribunal (“the Tribunal”) signed on 29 November 2007 which affirmed the decision of the delegate for the Minister for Immigration and Multicultural Affairs not to grant the applicant a Partner (Temporary) (Class UK) Visa, nor a Partner (Residence) (Class BS) Visa. Pursuant to r.44.11(c) of the *Federal Magistrates Court Rules 2001*. The Court dispensed with a hearing with r.44.12 and proceeded with a final hearing.

Background

2. On 28 February 2005 the applicant applied to the Department of Immigration and Multicultural Affairs for the above visas.
3. The application was refused by a delegate of the first respondent on 30 April 2005 (CB 93–102) and by the Tribunal on review on 1 November 2006 (CB 310–320). An application for judicial review was subsequently filed with this Court, and on 4 May 2007 Federal Magistrate Riley remitted the matter to the Tribunal to be determined according to law (CB 326). By decision signed on 29 November 2007, the second Tribunal affirmed the decision of the delegate not to grant the applicant a Partner (Temporary) (Class UK) visa, nor a Partner (Residence) (Class BS) visa (CB 501).
4. The matter is now before this Court pursuant to an application for judicial review filed on 11 January 2008.

The application

5. In his application, the applicant set out three grounds as follows:

“1. The decision was affected by jurisdictional error in that the Tribunal took into account irrelevant considerations.

PARTICULARS

- (a) The Tribunal took into account the applicant’s business visa applications in or about 2003 and 2004, made after his divorce from his first wife but giving his status as married, when this was not relevant under Regulation 1.15A of the Migration Regulations 1994 nor under the requirements of items 820.211, 820.221 and 801 of Schedule 2 to the Migration Regulations 1994. (Decision p. 16-17).*
- (b) The Tribunal took into account the circumstances of the applicant’s relationship with his first wife in 2003 and 2004 when this was not relevant under Regulation 1.15A of the Migration Regulations 1994 nor under the requirements of items 820.211, 820.221 or 801 of Schedule 2 to the Migration Regulations 1994. (Decision p.16-17).*

2. *The decision was affected by jurisdictional error in that the Tribunal failed to have regard to relevant material or considerations.*

PARTICULARS

- (a) *The Tribunal failed to consider and to determine the relationship between the applicant and the sponsor at the time of his application for the visas as required by Regulation 1.15A of the Migration Regulations 1994 and items 820.211, 820.221 and 801 of Schedule 2 to the Migration Regulations 1994. Decision p.16-17).*
 - (b) *The Tribunal failed to have regard to the language difficulties of the applicant and the sponsor in determining whether the sponsor's evidence to the first respondent's department about the applicant's children from his first marriage could have been the result of a misunderstanding. (Decision, p.16)*
3. *The decision was affected by jurisdictional error in that it was unreasonable.*

PARTICULARS

- (a) *The Tribunal accepted that it had strong evidence of the applicant's spousal relationship with the sponsor, and the evidence relied on by the Tribunal to the contrary was not relevant, and relevant evidence was not taken into account. (Decision p. 16)*
 - (b) *The applicant refers to and repeats the particulars to the other grounds herein."*

Findings of the Court in relation to the grounds in the application

6. Ground 1(a) complains that the Tribunal took into account an irrelevant consideration being the fact that the applicant had stated that he was married when he was not. The Tribunal considered this evidence and said that either "*the genuineness of his present marriage is directly undermined...*" or, "*at least his credibility is undermined*". The evidence was therefore relevant to whether the relationship between the parties was "*genuine and continuing*" (reg.1.15A (1)(b) (ii)) and as to the credibility of the applicant. Both questions was relevant to the Tribunal's enquiries.

7. Ground 1(b) claims that the Tribunal took account of an irrelevant consideration being the applicant's relationship with his first wife. The relevance of that information is demonstrated by the decision of the Court under claim 1(a) above. Further the Tribunal states (at CB 516.7) that *"the applicant's ex-wife came (to Australia) in February 2003 about a fortnight after getting divorced. She also applied to come on his second trip. Without a business case an inference can be drawn that they were still in a spousal relationship although technically divorced"* (CB 516.7). The relevance of the evidence is apparent.
8. Ground one is dismissed.
9. Ground 2(a) alleges that the Tribunal failed to determine the relationship between the applicant and the sponsor at the time of his application for a visa. The Tribunal set out the primary relevant criteria to be satisfied at the time of the application (at CB 514.6) and then proceeded to examine whether it was met. The Tribunal found that *"at the time of application..., and at the time of this decision, the visa applicant and sponsor were married"*(CB 514.10). The Tribunal found that *"the applicant and the sponsor did not at the time of application... have a mutual commitment to a shared life..."* (CB 516.9). There is nothing in the decision to establish that the Tribunal did not consider the relevant criteria as at the time of the application.
10. Ground 2(b) alleges that the Tribunal did not have regard to the language difficulties and whether that could have led to a misunderstanding of the evidence given to the Department.
11. The Court accepts the submissions for the first respondent that:

"In any event, the Tribunal had invited the applicant to comment on this issue pursuant to its s.359A letter dated 5 September 2006 [CB 287]. The Tribunal did consider the applicant's response and found that the issue had not been adequately explained [CB 516]. The letter of response dated 8 October 2006 [CB 289] did not allege that the "misunderstanding" was due to language difficulties. Despite being given the opportunity to make this claim, the applicant did not submit to the Tribunal that the "misunderstanding" was due to language difficulties."

12. The Tribunal was alive to the issue and referred to it (CB 504.5); in the s.359A letter (CB 287), and received and considered a response on the issue (CB 289). The Tribunal referred to the possibility of a misunderstanding of the evidence (CB 509.2). The Tribunal stated that the evidence that the sponsor believed that the two children of the applicant's first marriage were not his biological children "*had not been adequately explained.*" The Tribunal in its first decision referred to the possible misreporting of the sponsor's comments (CB 506.7). The Tribunal therefore considered possible explanations for the evidence and concluded that "*it was difficult to see how such an item of evidence could come about through a misunderstanding.*" (CB 516.8). The Tribunal was aware of the language difficulties between the sponsor and applicant and referred to them (CB 506.3, 507.4 and 507.7), but obviously did not accept that as explaining the evidence given to the Department. The Tribunal was entitled to reject that evidence. As stated by the Federal Court of Australia in *Lee v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 464 at [27]:

"The Tribunal is entitled to accept or reject or give such weight to the evidence proffered as it thinks appropriate in all the circumstances."

13. The Tribunal did not have to deal specifically with all issues in detail in its decision. As stated by Justice Heerey in *Granada Tavern v Smith* [2008] FCA 646:

"...Perhaps his Honour did not record and deal with every argument advanced on behalf of the appellants, but he was not obliged to do so. In Kovan Engineering (Aust) Pty Ltd v Gold Peg International Pty Ltd (2006) 234 ALR 241 an issue arose as to the adequacy of the reasons of the trial judge. Weinberg J and I said:

44 As to the second matter, the obligations of the trial judge to give adequate reasons, on the appeal Kovan relied strongly on what was said by Nettle JA (with whom Batt and Vincent JJA agreed) in Hunter v Transport Accident Commission (2005) 43 MVR 130 at [21]. While noting that the extent of the reasons will depend on the circumstances of the case, his Honour said that the reasons should deal with the "substantial" points which have been raised, include findings on "material" questions of fact and provide and

“intelligible” explanation of the reasoning from evidence to findings to ultimate conclusion. Reference to the evidence should not be limited to the evidence that has been accepted and acted upon, but “ordinarily” should deal with the “substantial” points made in evidence which has been rejected and explain why it has been rejected. The judge must deal with evidence which is “relevant and cogent”, arguments which are “substantial” and issues which are “significant” and

45 No matter how prescriptive the principles laid down, they inevitably involve disclaimers as to any universal applicability. Moreover, the passage from Hunter would give an unbalanced view if it were not read in conjunction with the firm warnings of courts of high authority against over-lengthy judgments. These are noted by the Full Court in Expectation Pty Ltd v PRD Realty Pty Ltd (2004) 140 FCR 17 at [83]. Of the cases there referred to, particular note should be taken of what was said by the New South Wales Court of Appeal in Digi-Tech (Aust) Ltd v Brand (2004) 62 IPR 184 at [287]-[290] and the following passage from the joint judgment of Gleeson CJ, McHugh and Gummow JJ in Whisprun Pty Ltd v Dixon (2003) 200 ALR 447 (at [62]):

...it should not be accepted that Newman J failed, at least in a general way, to consider the matters to which the Court of Appeal referred. The fact that his Honour did not refer to these matters in his judgment is not decisive. A judge’s reasons are not required to mention every fact or argument relied on by the losing party as relevant to an issue. Judgments of trial judges would soon become longer than they already are if a judge’s failure to mention such facts and arguments would be evidence that he or she had not properly considered the losing party’s case.”

14. *Granada Tavern v Smith* (2008) and *Whisprun Pty Ltd v Dixon* (2003) were decided after *Minister for Immigration v Yusuf* (2001) 206 CLR 323, and the Court applies the former. Ground 2 is rejected.
15. Ground 3(a) claims that the Tribunal had strong evidence of the applicant’s spousal relationship and that the evidence relied on to the contrary was not relevant.

16. The evidence to the contrary is set out on (CB 516.2). The Tribunal found that the concerns “*go to the heart of whether the marriage is exclusive and genuine.*” Those are two issues required to be considered under reg 1.15A (1A)(b)(xi) and (ii).
17. Claim 3(a) is dismissed.
18. Claim 3(b) relies on the particulars already rejected above which include the claim that the decision was unreasonable.
19. The Court refers to the decision of Justice Finklestein in *Applicants M160/2003 v Minister for Immigration and Multicultural and Indigenous Affairs & Ors* [2005] FCA 195 at [32] as follows:
- “The prosecutors’ final ground of complaint is that the tribunal’s decision was unreasonable, irrational and illogical. I am bound to reject this complaint. A fair reading of the tribunal’s reasons suggests to me that its findings were supported by the evidence and its reasons do not indicate any want of logic or irrationality. Even if they did, the Full Court has held that want of logic does not constitute an error of law and cannot constitute a ground for judicial review: Minister for Immigration and Multicultural Affairs v Epeabaka (1999) 84 FCR 411, 420-422; NACB v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCAFC 235 at [22]-[229].”*
20. Claim 3(b) is dismissed.
21. The Court will now examine the decision on other bases.
22. The decision of the Tribunal turned on findings of fact and what weight the Tribunal gave to the evidence before it.
23. In *NAHI v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 10, the Full Court of the Federal Court decided at [10] as follows:
- “In their written submissions, the appellants took exception to a number of findings of the Tribunal. In many cases, those exceptions were purely on the basis that the appellants disagree with the findings. In effect, the appellants sought to have the Court take a different view of various issues of fact from that taken by the Tribunal. To engage in fact-finding about the merits of the appellants’ case is no part of the function of the Court,*

whether at first instance or on appeal, in dealing with an application for relief under s.39B of the Judiciary Act. As Stone J said, Plaintiff S157 establishes that it is necessary for the appellants to show jurisdictional error on the part of the Tribunal, if they are to succeed. Whatever be the boundaries of jurisdictional error, they do not comprehend errors of fact as to merits of the case put to the Tribunal.”

24. And at [11]:

“By s.420(2)(a) of the Migration Act, the Tribunal is not bound by the rules of evidence. By s.424(1), in conducting a review, the Tribunal may get any information that it considers relevant. There can be no objection in principle to the Tribunal relying on ‘country information’. The weight that it gives to such information is a matter for the Tribunal itself, as part of its fact-finding function. Such information as the Tribunal obtains for itself is not restricted to ‘guidance’, as the appellants submitted. It may be used to assess the credibility of a claim of a well-founded fear of persecution. It is not, as the first appellant submitted, an error of law, or a jurisdictional error, for the Tribunal to base a decision on ‘country information’ that is not true. The question of the accuracy of the ‘country information’ is one for the Tribunal, not for the Court. If the Court were to make its own assessment of the truth of ‘country information’, it would be engaging in merits review. The Court does not have power to do that.”

25. The Court agrees with the following submission in another matter:

“The Tribunal’s conclusion that the Applicant was not credible and his claims untrue are findings of fact par excellence: Re MIMA; ex parte Durairajasingham (2000) 168 ALR 407 (HCA/McHugh J) at [67]. So long as the Tribunal’s findings were open to it, no error is demonstrated: Kopalapillai v MIMA (1998) 86 FCR 547 (FC) at 558-559; W148/00A v MIMA (2001) 185 ALR 703 (FCA/FC) at [64-69] per Tamberlin and RD Nicholson JJ. The Tribunal’s findings were open for the reasons it gives. The Court cannot review the merits of the Tribunal’s decision: MIEA v Wu Shan Liang (1996) 185 CLR 259 at 272, and there is no error of law, let alone a jurisdictional error, in the Tribunal making a wrong finding of fact: Abebe v Commonwealth (1999) 197 CLR 510 at [137].”

26. The Court refers to the decision in *Chen Xin He v Minister for Immigration and Ethnic Affairs* (Federal Court of Australia, RD Nicholson J, 23 November 1995, unreported) at [24]:

“It is not the case, as the submissions for the applicant appear to assume, that the evidence of the applicant should have been believed by the Tribunal unless specifically disproved by the objective evidence before the Tribunal. Rather it was for the Tribunal to decide what facts it found on a consideration of all the evidence, subjective and objective. This required the Tribunal not only to consider inconsistencies but also to determine what evidence it found credible.”

27. As stated in *Tefonu Pty Limited v Insurance and Superannuation Commissioner* (1993) 44 FCR 361 per Beazley J at [54]:

“The weight which is to be given to a relevant factor is a matter for the Tribunal, unless it can be said that the Tribunal’s decision is manifestly unreasonable. (Minister for Aboriginal Affairs and Anor. v. Peko-Wallsend Limited and Ors (1985-1986) 162 CLR 24 at 41; Associated Provincial Picture Houses, Limited v. Wednesbury Corporation (1948) 1 KB 223 at 230, 233-234).”

28. The decision must be so unreasonable *“that no reasonable body could have come to it”*: Ibid at [41].

29. As stated by the Full Court of the Federal Court in *Minister for Immigration and Citizenship v Applicant A125 of 2003* [2007] FCAFC 162 at [95]:

“Plainly, the weight to be accorded to the applicant’s evidence was a matter for the RRT. It is not a matter for this Court”.

30. As stated in *Lee ante*:

“The Tribunal is entitled to accept or reject or give such weight to the evidence proffered as it thinks appropriate in all the circumstances.”

31. The Court refers to the decision of Collier J in *SZINP v Minister for Immigration and Citizenship* [2007] FCA 1747 at [26] as follows:

“Decisions of the Tribunal are privative clause decisions and as such are not open to review on the facts: S157/2002 v Commonwealth (2003) 211 CLR 476. As is clear from such cases as Attorney-General (NSW) v Quinn (1990) 170 CLR 1 and NAAP v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FCAFC 76 errors of fact do not give rise to jurisdictional errors.”

32. And at [29]:

“the weight given by the Tribunal to evidence before it, both oral and written evidence, is a matter for the Tribunal in its role as the arbiter of fact: Minister for Immigration and Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259, and

Wednesbury unreasonableness leaves the merits of a decision or action unaffected unless the decision or action is such as to amount to an abuse of power: Nottinghamshire County Council v Secretary of State for the Environment”: Attorney General for the State of NSW v Quin (1990) 170 CLR 1 at 35.”

33. The issue the applicant seeks to agitate is no more than an impermissible attack on the factual findings of the Tribunal. The challenge is no more than an application to review the merits. The authorities make clear that the making of findings of fact is uniquely a matter for the decision-maker. In *SHUB v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 137 FCR 43, the Full Court (at [12] quoted a passage from the decision of Selway J at first instance, where his honour had said:

“16 I have considered all of the matters put to me. The relevant principle is clear. Notwithstanding whatever concerns I may have about the reasoning of the Tribunal is analysing the factual material before it, the assessments of the material was a matter for the Tribunal, not for this Court. The appellant asked the Court to undertake a review on the merits of the decision of the Tribunal. The Court has no jurisdiction to do so. As was put by Justice Kenny in a similar context in Minister for Immigration and Multicultural Affairs v Rajalingam (1999) 93 FCR 220 AT [146]:

‘A tribunal such as the RRT does not commit an error of law merely because it adopts unsound or questionable reasoning. See Minister for Immigration and Multicultural Affairs v Eshetu [(1999) 197 CLR 611]...at paras 40, 44-45

per Gleeson CJ and McHugh J, 138 per Gummow J and of para 159 per Hayne; Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321 at 356 per Mason CJ with Brennan J at 365, Deane J at 369 and Toohey and Gaudron JJ at 387 agreed; Road Corporation v Dacakis [1995] 2 VR 508 at 517-520; Minister for Immigration and Affairs v Epeabaka (1999) 160 ALR 543 (FC)...agree with the remarks of Katz J in [Zuway v Minister for Immigration and Multicultural Affairs 160 ALR] that a search by the Court for objective cogency in the reasons of the RRT creates a real risk that the Court will substitute its own view of the merits of the case for that of the Tribunal’.”

34. In *Nassouh v Minister for Immigration and Multicultural Affairs* [2000] FCA 788 Justice Katz considered the requirements of reg.1.15A and decided the Regulation specifies matters that the Minister must have regard to.
35. The criteria for a Subclass 280 Visa are set out in Part 820 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the “Regulations”).
36. In the present case only cl.820.211(2) is relevant to the visa applicants claimed circumstances. Clause 820.211(2) requires that at the time of application the visa applicant be the spouse of an Australian citizen (CB 514.6).
37. Regulation 1.15A of the Regulations as at the time the application was made provided as follows:

“Regulation 1.15A – Spouse

- (1) *For the purposes of these Regulations, a person is the spouse of another person if the 2 persons are:*
 - (a) *in a married relationship, as described in subregulation (1A); or*
 - (b) *in a de facto relationship, as described in subregulation (2).*
- (1A) *Persons are in a married relationship if:*
 - (a) *they are married to each other under a marriage that is recognised as valid for the purposes of the Act; and*
 - (b) *the Minister is satisfied that:*

- (i) *they have a mutual commitment to a shared life as husband and wife to the exclusion of all others; and*
 - (ii) *the relationship between them is genuine and continuing; and*
 - (iii) *they:*
 - (A) *live together; or*
 - (B) *do not live separately and apart on a permanent basis.*
- (2) *Persons are in a de facto relationship if:*
- (a) *they:*
 - (i) *are of opposite sexes; and*
 - (ii) *are not married to each other under a marriage that is recognised as valid for the purposes of the Act; and*
 - (iii) *are not within a relationship that is a prohibited relationship for the purposes of subsection 23B (2) of the Marriage Act 1961 ; and*
 - (b) *they are of full age, that is:*
 - (i) *if either of the persons is domiciled in Australia -- both of them have turned 18; or*
 - (ii) *if neither of the persons is domiciled in Australia -- both of them have turned 16; and*
 - (c) *the Minister is satisfied that:*
 - (i) *they have a mutual commitment to a shared life as husband and wife to the exclusion of all others; and*
 - (ii) *the relationship between them is genuine and continuing; and*
 - (iii) *they:*
 - (A) *live together; or*

- (B) *do not live separately and apart on a permanent basis; and*
- (d) *subject to paragraph (e) and subregulation (2A), where either of them is an applicant for a permanent visa, a Student (Temporary) (Class TU) visa, a Partner (Provisional) (Class UF) visa, a Partner (Temporary) (Class UK) visa, or a General Skilled Migration visa -- the Minister is satisfied that, for the period of 12 months immediately preceding the date of application of the party relying on the existence of the relationship:*
 - (i) *they had a mutual commitment to a shared life as husband and wife to the exclusion of all others; and*
 - (ii) *the relationship between them was genuine and continuing; and*
 - (iii) *they had:*
 - (A) *been living together; or*
 - (B) *not been living separately and apart on a permanent basis; and*
- (e) *where either of them is an applicant for a Resolution of Status (Residence) (Class BL) or Resolution of Status (Temporary) (Class UH) visa -- the Minister is satisfied (unless the applicant can establish compelling and compassionate circumstances for the grant of the visa) that, for the period of 12 months immediately preceding 13 June 1997:*
 - (i) *they had a mutual commitment to a shared life as husband and wife to the exclusion of all others; and*
 - (ii) *the relationship between them was genuine and continuing; and*
 - (iii) *they had:*
 - (A) *been living together; or*
 - (B) *not been living separately and apart on a permanent basis.*

(2A) Paragraph 2 (d) does not apply if:

(a) the applicant is applying as:

(i) the spouse of a person who:

(A) is, or was, the holder of a permanent humanitarian visa; and

(B) before that permanent humanitarian visa was granted, was in a relationship with the applicant that satisfies the requirements of subparagraphs (2) (c) (i), (ii) and (iii) and of which Immigration was informed before the visa was granted; or

(ii) a member of the family unit of a person who is an applicant for a permanent humanitarian visa; or

(b) the applicant can establish compelling and compassionate circumstances for the grant of the visa.

*Note **permanent humanitarian visa** is defined in regulation 1.03.*

(3) In forming an opinion whether 2 persons are in a married relationship, or a de facto relationship, in relation to an application for:

(ad) a Partner (Migrant) (Class BC) visa; or

(ae) a Partner (Provisional) (Class UF) visa; or

(af) a Partner (Residence) (Class BS) visa; or

(ag) a Partner (Temporary) (Class UK) visa;

the Minister must have regard to all of the circumstances of the relationship, including, in particular:

(a) the financial aspects of the relationship, including:

(i) any joint ownership of real estate or other major assets; and

(ii) any joint liabilities; and

(iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and

- (iv) *whether one party to the relationship owes any legal obligation in respect of the other; and*
 - (v) *the basis of any sharing of day-to-day household expenses;*
 - (b) *the nature of the household, including:*
 - (i) *any joint responsibility for care and support of children, if any; and*
 - (ii) *the parties' living arrangements; and*
 - (iii) *any sharing of responsibility for housework;*
 - (c) *the social aspects of the relationship, including:*
 - (i) *whether the persons represent themselves to other people as being married or in a de facto relationship with each other;*
 - (ii) *the opinion of the persons' friends and acquaintances about the nature of the relationship; and*
 - (iii) *any basis on which the persons plan and undertake joint social activities;*
 - (d) *the nature of the persons' commitment to each other, including:*
 - (i) *the duration of the relationship; and*
 - (ii) *the length of time during which the persons have lived together; and*
 - (iii) *the degree of companionship and emotional support that the persons draw from each other; and*
 - (iv) *whether the persons see the relationship as a long-term one.*
- (4) *In forming an opinion whether 2 persons are in a married relationship, or a de facto relationship, in relation to an application for a visa of a class other than a class specified in paragraph (3) (ad), (ae), (af) or (ag), the Minister may have regard to any of the factors set out in subregulation (3).*

(5) *If 2 persons have been living together at the same address for 6 months or longer, that fact is to be taken to be strong evidence that the relationship is genuine and continuing, but a relationship of shorter duration is not to be taken not to be genuine and continuing only for that reason.*”

38. Regulation 1.15A provides that a person is the spouse of another person if the two persons are either married or live in a de facto relationship. The Tribunal found that at the time of the application for the visa, and at the time of the decision, the visa applicant and the sponsor were and remained married to each other. They therefore satisfy the requirements...for a married relationship (CB 514.10).

39. The Tribunal continued:

“Being a “spouse”, however, also requires that there is a mutual commitment to a shared life as husband and wife to the exclusion of all others, that the relationship is genuine and continuing, and that the couple live together, or do not live separately and apart on a permanent basis: r.1.15.A(1A)(b) and (2)(c).

The Tribunal, in applying regulation 1.15A, must take into account the considerations set out in regulation 1.15A(3). These considerations relate to all of the circumstances of the relationship including, in particular, the financial aspects of the relationship, the nature of the household, the social aspects of the relationship and nature of the persons’ commitment to each other...

In assessing the relationship at the time of application the Tribunal is permitted to have regard to the material that has been provided that relates to their relationship subsequent to the application (Bretag v Minister for Immigration, Local Government and Ethnic Affairs (Unreported, Federal Court, O’Loughlin J, 29 November 1991) at [12]. But Bretag does not support the argument that subsequent events can overcome, correct or override past factual events).

Concerning the financial aspects of the relationship the Tribunal notes that the applicant and sponsor gave clear information about how they split their expenses and who has access to what bank account. They have purchased a house jointly and most if not all of their utility and other accounts are in joint names. They have declared the applicant’s income thus reducing the sponsor’s dependence on welfare. It is stated that the sponsor and her daughter sometimes help out in the kebab shop.

As for the nature of their household, there was a lot of correspondence addressed to the applicants at a common address, and there were also photos of them at home. Although there was an allegation they were not living together, there is no positive evidence that the applicant lived at any specific other place. The fact that two person have lived together for a period of 6 months of more is to be taken as strong evidence of a genuine and continuing relationship r.1.15A(5). The applicant and sponsor also gave evidence of how the household is run in terms of shopping, housework and care of the children. The applicant seems to have had a significant positive impact of the lives of the children in particular.

There was strong evidence of social recognition of the relationship by friends, neighbours, customers, their business landlord, and schools. There were a number of photographs of the applicant and sponsor, and their children, out at different places either as a family alone or with other people. The applicant gave evidence that he had been instrumental in reconciling the sponsor with her siblings and it was stated that her mother, having come to hers with the marriage, was a frequent regular visitor.

As for the nature of the parties commitment to each other the Tribunal notes that the sponsor has taken the applicant's surname as her own, and that they have embarked on an expensive and onerous IVF program. The latter factor must be given considerable weight, but it is not rare for two people to deliberately have a child without an intention to be spouses. Both parties gave evidence that they were happy and committed, and this was the tenor of statutory declarations and oral evidence of their friends. The applicant put forward reasons why he was unhappy in his previous marriage and how it compared to his relationship with the sponsor.

The above is all strong evidence in favour of the application. However, there are important matters of concern in the evidence.

After the applicant was divorced he made two further visa applications stating he was married. The explanation he gave for this was not at all convincing in spite of the claims of his lawyer and translator (whose ethics must therefore be in question). The Turkish judgment he referred to was delivered in a case where one party to a divorce required that it be reversed. Until that happened, the parties were divorced. It is not readily plausible that a lay person who believed themselves to be divorced would, reading of a

court case like that, see that their status might have changed, nor that they would be advised by an attorney in the way claimed.”

40. *“The Tribunal is entitled to accept or reject or give such weight to the evidence professed as it thinks appropriate in all the circumstances.”*
Lee ante..

41. The Tribunal continued:

“The applicant either considered himself married to his ex-wife after he was “divorced”, or he represented himself as married believing it would facilitate his visa approval. In the first case, the genuineness of his present marriage is directly undermined. And in the second case, at least his credibility is in doubt.

Moreover, the Tribunal is not satisfied that the applicant’s primary purpose in visiting Australia in February 2003 or 2004 was business, notwithstanding the evidence of his business contacts here in Australia. The initial responses of Mr Barutcu when questioned about the applicant’s travel and purchase expenses indicated that the applicant was not funded to come to Australia. This has not been persuasively overturned. The business case for the applicant’s ex-wife to come to Australia with him was not commercially realistic. Not only is there no evidence supporting his claim that she worked for the same company, it is also not clear why any of the products he was proposing to import, even the doner knives needed to be checked by an engineer from Turkey. The applicant’s ex-wife came in February 2003 about a fortnight after getting divorced. She also applied to come on his second trip. Without a business case, the inference can be drawn that they were still in a spousal relationship although technically divorced.

The applicant’s evidence was that she finally moved out in December 2003 or January 2004, yet on his arrival in February he developed a relationship with the sponsor. That kind of rebound reaction can occur.

It is indicated in the record of one of their interviews with the Delegate that the sponsor believed that the two children of the applicant’s first marriage were not his biological children. This has not been adequately explained. It is difficult to see how such an item of evidence could come about as a result of a misunderstanding. The inference can be drawn that the applicant told the sponsor he did not have children of his own. Furthermore, the sponsor had an unnatural degree of disinterest

in any of the personal details of the applicant's ex-wife and his children, which was not adequately explained by her claimed preoccupation with their present shared life, or jealousy.

These are not peripheral concerns but go to the heart of whether the marriage is exclusive and genuine. Having carefully weighted the evidence, the Tribunal finds that the applicant and the sponsor did not at the time of application, and do not at the time of decision, have a mutual commitment to a shared life as husband and wife to the exclusion of all others. It finds that the relationship was not genuine but was contrived for migration purposes.

The applicant therefore is not the spouse of the sponsor."

42. Findings of fact are a matter for the Tribunal, not the Court (supra).
43. All those findings of fact were properly open to the Tribunal on the material before it and are not open to challenge.
44. The Tribunal continued:

"He does not meet the requirements of clause 820.211(2) for the grant of a Partner subclass 820 visa.

It is a criterion for the grant of a subclass 801 visa relevant to his case that the applicant hold a subclass 820 visa. As the applicant does not meet the criteria for a subclass 820 visa, he cannot meet the criteria for a subclass 801 visa.

Conclusions

Given these findings the Tribunal has no alternative than to affirm the decision under review."

45. No error of law has been established.
46. The applicant expressed concern (Court transcript page 3 line 1) that the Tribunal made such a strong finding against the applicant that the relationship was contrived for migration purposes having found that there was strong evidence in favour of the application (CB 516.2). What this demonstrates is that the Tribunal considered the evidence in favour of the application, but gave more weight to matters that "go to the heart of whether the marriage is exclusive and genuine". Weight is a matter for the Tribunal. *Tefonu* ante. The findings of fact were open to the Tribunal on the material before it. No error of law has been established.

47. The applicant contends that the Tribunal made a jurisdictional error by having regard to irrelevant considerations (Court transcript page 12 line 20) being the motivation of the applicant for stating he was married in his applications in 2003 and 2004, and the applicant's primary purpose for visiting Australia in February 2003 and 2004. These matters are relevant to the applicant's credibility and the genuineness of the applicant; they were properly taken into account.
48. The applicant submits that the evidence before the Tribunal was not sufficient to find that the applicant and sponsor were not in a spousal relationship. That finding was properly open to the Tribunal on the material before it and is not subject to review. It is then put for the applicant what would in his view be sufficient evidence. That is not a relevant issue. The applicant contends that "the decision was so unreasonable that the Tribunal could not have decided it acting within jurisdiction" (Court transcript page 17 line 15). *Wednesbury unreasonableness* has not been established (*Associated Provincial Picture Houses Ltd v Wednesbury Corp* (1948) 1 KB 223. The decision of the Tribunal was properly open on the material before it.
49. The applicant referred then to the judgment in *Re MIMIA, ex parte Applicant S20/2002* (2003) 77 ALJR 1165 at [53], [58] and [60], for the contention that "*the fact that a submission requires the Court to look at how the Tribunal went about its finding of fact does not mean that it cannot be an argument advanced on a matter of judicial review*". The Court accepts that contention but finds no error in the way the Tribunal went about its finding of facts. The applicant referred to the decision of *MIC v Le & Others* (2007) 242 ALR 455 for the proposition that a failure by the Tribunal to make enquiries of the Department can be so unreasonable as to be jurisdictional error. It is asserted that the "*Tribunal having found that there was an enormous weight of evidence positively in favour of the application...*" it then said "*regardless of that, the three matters identified on (CB 516) are sufficient central matters to ditch the whole application*". The Tribunal found "*important matters of concern in the evidence*" and went onto analyse them. It found that they are not peripheral but go to the heart of whether the marriage is exclusive and genuine (CB 516.10). The Tribunal was not required to make enquiries. The Tribunal was free to accept or reject or give weight to the evidence as it

thinks appropriate in all the circumstances *Lee ante*. The Applicant contends that the Tribunal fell into error by not specifying “*just how or why it came to the conclusion that the lack of genuineness continued from 2003 to 2004 to the date of application*” (Court transcript page 22 line 35). The Tribunal explained why it had concerns about the evidence (CB 516.2). An error has not been established.

50. Ms Burchell submitted for the first respondent that the “*nub of the proceedings is whether the relationship was genuine and the Tribunal undertook its mandatory task of evaluating the critical issues...*” and there is nothing that prohibits the Tribunal from looking at all the evidence... The Court accepts that submission.
51. Ms Burchell referred to a comparable case of *Young v MIC & Anor* [2008] FMCA 516 and in particular para 30 where Federal Magistrate Lloyd Jones found that “*it is not a matter of elevating or requiring the other evidence to have more weight*”, the Tribunal simply did not believe the visa applicant and there is no jurisdictional error in that. The same finding applies in this case.
52. Ms Burchell submitted correctly that the alleged difficulties in communicating were not a relevant consideration as the Act did not require the Tribunal to have regard to it. In any event the Tribunal had regard to communication difficulties, ante, and stated that it “*had not been adequately explained*” and “*how the sponsor believed that the two children of the applicant’s first marriage were not his biological children*” (CB 516.8). The sponsor gave her explanation to the second Tribunal (Supplementary Court Book 54.1)

Conclusion

53. The Court finds that the Tribunal’s decision is a privative clause decision that has not been infected with jurisdictional error. In such circumstances, and pursuant to s.474 of the Act, there is no jurisdiction for this Court to interfere.
54. Accordingly, the application is dismissed.

I certify that the preceding fifty-two (52) paragraphs are a true copy of the reasons for judgment of Turner FM

Associate:

Date: